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Lieberman

## DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

[Protest of Contract Award for Special Education Study for Peace Corps]

FILE: B-200074

DATE: April 27, 1981

MATTER OF: Evelyn Gonzales International

DLG06598  
DLG06599

## DIGEST:

1. Protest relating to solicitation improprieties must be filed with GAO prior to closing date for receipt of proposals.
2. Protester's lower cost is not basis to consider its technically unacceptable offer, since once offer is properly eliminated as technically unacceptable, it is irrelevant whether it might provide lower cost.
3. Determination that proposal is technically unacceptable is within contracting agency's discretion and will not be disturbed absent clear showing that it was arbitrary, which is not provided by protester's disagreement with agency assessments.
4. Alleged delay in performing evaluation and awarding contract is immaterial, since protester has not shown any impropriety, but only that evaluation procedure took longer than agency's original estimate, and protester has not shown any prejudice as result of alleged delay.
5. Transfer of proposal evaluation from small purchase section to negotiated contracts section of contracting agency is not objectionable, since proposals were over \$10,000, appropriate determination and finding was made under 41 U.S.C. § 252(c)(10) (1976)

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to conduct negotiated procurement, and all competing proposals were submitted on basis of identical information and were evaluated by same section.

6. Protester has not met burden of proof to establish that it was treated in racially discriminatory manner.
7. Exclusive remedy under Freedom of Information Act when agency ignores or denies protester request for access to documents is appeal to courts.

Evelyn Gonzales International (International) protests the award of contract No. 80-043-1023 by ACTION to Partners of the Americas (Partners) for a special education case study for the Peace Corps.

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International alleges that ACTION utilized unusual contracting procedures; gave insufficient consideration to the cost differentials of competing proposals; provided inadequate technical review of its proposal; failed to provide required information to the protester; improperly disclosed confidential personal information concerning the protester; and failed to provide material requested by the protester under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976). Based on the following, the protest is denied in part and dismissed in part.

Study proposals were initially solicited by ACTION on April 29, 1980, using small purchase procedures outlined under Federal Procurement Regulations § 1-3.600, et seq. (1964 ed.). This procedure was employed, as authorized under 41 U.S.C. § 252(c)(3) (1976), because the estimated cost of the study was less than \$10,000. ACTION received five proposals and after evaluation determined that none was acceptable. ACTION revised and expanded its statement of work (SOW) and invited the five offerors to discuss the revisions with agency officials on June 17, 1980. At this meeting, ACTION officials orally advised the offerors of the deficiencies in their original proposals and provided them with a revised SOW, including the applicable evaluation criteria. By letter dated June 18, 1980, offerors were advised to submit their revised proposals

by June 25, 1980. According to International, the offerors were also advised that "a response on the award of the contract could be expected within a week of [that] deadline."

ACTION received three proposals, all of which were over \$10,000. Accordingly, a determination and finding (D&F) was made to utilize negotiations other than small purchase procedures pursuant to 41 U.S.C. § 252(c)(10) (1976). The proposals were then transferred from the agency's small purchase section to its contract negotiation section for processing. ACTION officials evaluated the three proposals and determined that only Partners' proposal responded to the Peace Corps' stated needs and displayed adequate understanding of the Peace Corps' program. The other two proposals were determined to be technically unacceptable. Award was made to Partners and International was advised by letter dated August 8, 1980. International filed its protest with our Office on August 21, 1980.

The unusual contracting procedures alleged by International include the asserted failure of the agency to provide International with specific information regarding the Peace Corps' program and the evaluation criteria. International also asserts that the procurement was improperly transferred from the agency's small purchase section to its contract negotiation section and that there were delays in the evaluation of its proposal and the award of the contract.

The alleged failure of the agency to provide the offerors with information concerning the Peace Corps' program and the evaluation criteria is a matter which pertains to solicitation improprieties which were readily apparent on the face of the solicitation. These assertions are untimely since, under our Bid Protest Procedures, protests alleging patent solicitation improprieties must be filed before the closing date for receipt of proposals. 4 C.F.R. § 20.2(b)(1) (1980); Decilog, B-198614, September 3, 1980, 80-2 CPD 169. Here, International's protest was not filed until after notice of award.

The transfer from the small purchase section was made as a result of the initial cost underestimate by the agency. In this respect, we note that an appropriate determination to conduct a negotiated procurement was made by the agency.

In any event, the failure of a procuring agency to prepare a D&F in a timely manner would be a matter of form rather than substance, which would not constitute a basis for sustaining a protest. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Electronic Composition, Inc., B-186755, February 15, 1977, 77-1 CPD 109.

As to the propriety of effecting this change by shifting the submitted proposals from the small purchase section to the negotiated procurement section, we do not find any reason to object to this procedure in view of the amounts of the proposals and the appropriate D&F to conduct a negotiated procurement. All of the offerors were briefed on June 17, 1980, regarding the deficiencies in their initial proposals; all were provided with the revised SOW and the new evaluation criteria at this briefing; all were given until June 25, 1980, to submit revised proposals. The offerors all submitted their revised proposals on the basis of identical information and all were evaluated by the contract negotiation section of the agency. Thus, there is no showing that the protester was treated differently or prejudiced by the particular manner of the transfer of the proposal and its consideration by a different section of the agency from that to which it was initially submitted.

International next asserts that the agency should have placed greater weight on the cost difference between its proposal price of \$13,789, and the \$23,821 price of Partners' proposal. The protester contends that payment of the additional \$10,000 constitutes a "waste of Taxpayer's money." In this regard, our Office has held that, once an offer has properly been determined to be technically unacceptable, a lower price which that offer might provide is irrelevant, since the offer cannot be considered for the award. Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218; Science Applications, Inc., B-193229, May 23, 1979, 79-1 CPD 369. Thus, this allegation is without merit.

International asserts that ACTION failed to give its proposal adequate technical review. In this regard, essentially the protester disputes the agency finding that it did not display "understanding of what will be involved in putting the project together" on the grounds that if this were the case, it could not have prepared

and submitted a proposal. The agency determined that International's proposal was primarily a restatement of the SOW. The protester also takes exception to ACTION's judgments regarding the viability of certain methodological approaches contained in its proposal.

Contracting officials are accorded a considerable range of judgment and discretion in carrying out an evaluation and the fact that the protester disagrees with the agency's evaluation does not establish that the evaluation had no reasonable basis. Moore-Johnson/Shotwell-Anderson, Inc., B-200093, February 11, 1981, 81-1 CPD 92. Further, it is not the function of this Office to evaluate proposals in order to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the contracting agency and must not be disturbed unless shown to be arbitrary or in violation of procurement statutes or regulations. Tracor, Inc., 56 Comp. Gen. 62 (1976), 76-2 CPD 386.

Here, we are presented with a disagreement between ACTION and International concerning the technical evaluation of the protester's proposal. However, the protester has not provided any showing that ACTION's evaluation was arbitrary and we have no basis for objection to it.

International also cites alleged delays in the evaluation process for which reasons were not provided and the general failure of the agency to keep International apprised of where its proposal was in the evaluation process. In this regard, while the agency may have underestimated the length of time it would take to evaluate the proposals and make the award, there is no showing that there was any impropriety involved. Moreover, all of the offerors were subjected to the same delay and there is no indication in the record that the protester suffered any adverse impact or prejudice as a result of the delay. We are unaware of any legal requirement that an agency keep an offeror constantly apprised of the exact status and physical location of its proposal during the course of an evaluation.

International complains that confidential personal information which it submitted in its proposal was improperly disclosed to an ACTION employee who called the protester and commented upon and inquired about the information.

The protester alleges that this inquiry (which related to the fact that the owner of International attended the same high school as the ACTION employee and had included one of the employee's relatives as a personal reference) implied an "unauthorized investigation of my nationality and ethnic-racial background for exclusionary discriminatory purposes as well as an unwarranted invasion of my privacy." ACTION advises that the agency official in question was, in fact, the procurement official to whom proposals had been sent. We fail to see how the inquiry in question indicates any discriminatory intent. In any case, ACTION has denied the allegation of discrimination and International has provided no evidence to support it. The protester has the burden of affirmatively proving its case, which is not met in this instance where the only evidence presented by the protester is inferential surmise which is contradicted by the agency. CEDC, Incorporated, B-196509, May 1, 1980, 80-1 CPD 311.

Regarding the alleged failure of ACTION to provide International with a copy of Partners' proposal, which the protester requested under FOIA, our Office has no authority to determine what records must be released by other Government agencies and, if the request is ignored or denied, the sole remedy is by suit in the United States District Court. Werner-Herbison-Padgett, B-195956, July 21, 1980, 80-2 CPD 52.

*Milton J. Aroslan*

Acting Comptroller General  
of the United States